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BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal of the
Residential Action Coalition

BZA Appeal No. 14866
Hearing Date: October 19, 1988

MOTION TO DISMISS APPEAL

Windem Associates, owner of the property at 1627 16th Street, N.W., moves this Board to dismiss the above-captioned appeal for the following reasons:

A. The District of Columbia Government is legally estopped from revoking the Certificates of Occupancy.

B. The appeal is barred by the doctrine of laches.

C. The Board of Zoning Adjustment lacks jurisdiction to hear the instant appeal.

D. The Residential Action Coalition lacks standing to prosecute the instant appeal.

WHEREFORE, the property owner herein, requests that the above-captioned appeal be dismissed with prejudice.

Respectfully submitted,

WILKES, ARTIS, HEDRICK & LANE,
CHARTERED

By Christopher H. Collins

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Ex. No. 30

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Statement in Opposition, Motion to Dismiss Appeal and attached Memorandum of Points and Authorities was hand delivered this 19th day of October, 1988 to: the Residential Action Coalition, c/o Katherine A. Eckles, 1524 T Street, N.W., Washington, D.C. 20009; and Joseph F. Bottner, Jr., Zoning Administrator, Room 333, 614 H Street, N.W., Washington, D.C. 20001.

Edward L. Donohue

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THE MOTION TO DISMISS APPEALS

I.
Introduction

Windem Associates, owner of the property which is the subject of this appeal, requests that the appeal be dismissed with prejudice. The Appellant is barred from prosecuting these appeals under the doctrines of laches and estoppel. In addition, the Appellant has failed to satisfy the threshold requirements of standing and jurisdiction. Furthermore, the allegations are not supported by the facts. The appeal should be summarily dismissed with prejudice.

II.
Statement of Facts

The Appellant, Residential Action Coalition, hereinafter "RAC" or "Appellant," challenges the issuance of a Certificate of Occupancy for the Embassy Inn, located at 1627 16th Street, N.W.

A. History Of Prior Use.

The Embassy Inn is a 40 room stucco building which was built in 1911. The Embassy Inn was formerly owned by the Dadian family, who also owned and operated the Windsor Inn at 1842 16th Street. The Dadians purchased the Embassy Inn in 1941, and operated it pursuant to hotel and later lodging house Certificates of Occupancy.

The Embassy Inn began operating as a short-term lodging facility in the 1920's. The records indicate that the Dadian family first obtained a Hotel Certificate of Occupancy in 1942 (Permit No. 74678). On April 11, 1946, another Hotel Certificate

of Occupancy was issued for the Embassy (No. 102409). In 1951, a Certificate of Occupancy for a lodging house was issued (Permit No. A-11961), but the transient nature of the operation remained the same.

In approximately 1963, the Dadians could no longer operate the Embassy and Windsor Inns, and both were closed. Two of the owners, sisters of Arthur Dadian who managed the hotels, were hospitalized with serious illnesses and both eventually died of these illnesses. The third owner practiced law and could not devote his time to the structures. Although the buildings were closed, the Dadians never intended to terminate or abandon the active operation of the two buildings for daily transient occupancy. Rather, it was their intention to resume the use once the two sisters recovered from their illnesses. This is evidenced by the physical appearance of the structures including the retention of the furniture, linens and towels. Photographs taken by the present owner in 1985 show all the accoutrements of an inn. Mr. Dadian also indicated to the present owners in 1985 that he always intended to resume the lodging house operation. Arthur Dadian sold the two buildings to the present owners in July of 1985.

B. Present Use Of The Property.

The present owner, Windem Associates (Intervenor herein) purchased the Inn in 1985, at a cost of $669,412. Subsequently, the Inn was completely renovated and restored at a cost to the present owner of $1,030,443.

Prior to purchasing the Embassy Inn, the present owner initiated a series of steps to ensure that the long-standing lodging house operation of the Embassy Inn could continue as a permitted nonconforming use in the R-5-C zone.

In a series of discussions with the previous Zoning Administrator, James J. Fahey, it was determined that the

definition of "Inn" under the current Zoning Regulations was nearest to the earlier term "lodging house". Mr. Fahey also confirmed that the Certificate of Occupancy could be issued for the Embassy Inn based on the previous operation of the hotel/lodging house since the 1940's.

Based upon this information, the building was purchased at a cost of $669,412. The owners then commenced a total rehabilitation of the building during 1985-1987, pursuant to validly issued building permits. The total cost of the renovation was $1,030,443. After all renovation work was completed, the Certificate of Occupancy for the Embassy Inn was issued on June 26, 1987.

c. Challenge By RAC.

On June 2, 1988, almost 3 years after the Zoning Administrator confirmed the validity of the "Inn" use for the property, RAC filed this appeal challenging the June, 1987 issuance of the Inn Certificate of Occupancy for the Embassy Inn. RAC asserts that the tax records listed the property as Class II, and that the Lusk Directory listed a series of classifications for the site. Based upon these classifications, RAC argues the "discontinuance" provision (Section 2005.1) would bar the continuation of the transient use. Last, RAC challenges the Inn's compliance with the parking requirements of the Zoning Regulations.

In support of the allegation of a discontinuance, RAC offers the application for Certificate of Occupancy filed by the present owner which states, erroneously, that the prior use was "apartment house". As the Zoning Division's records indicate, this was simply a mistake. The Zoning Administrator had previously confirmed the prior use by that time.

RAC also contends that the tax forms filed by Arthur Dadian, the previous owner, which indicate a "Class II" status, are evidence of a discontinuance of the nonconforming use. An

examination of the law clearly demonstrates that a 40 rooming unit building, by whatever name it is called, cannot qualify for a tax status which applies to buildings with no more than 5 units. See D.C. Code Section 47-813(b)(2). Intervenor's position is that the erroneous tax filing of the previous owner, without any substantive or probative evidence for support, has no effect on the zoning status of the property.

RAC also states that the 3 year discontinuance provision of 11 DCMR 2005.1 should apply to establish prima facie evidence of no intention to resume active operation as a nonconforming use. However, the 3 year period did not expire until 3 years from the effective date of the Section 2005.1, which was in August, 1983. The first Building Permit for renovation was issued on July 11, 1985 (Permit No. B308809), and thus the 3 year provision does not apply.

RAC is also of the position that, due to the alleged change in zoning status, a new parking requirement is therefore imposed. The building is a contributing building to the character of the 16th Street Historic District, and therefore would be entitled to parking and loading waivers. (See Sections 2100.5 and 2200.5). As such, if there were a change in use, no parking would be required due to the provisions of Section 2100.5. Notwithstanding this provision, the parking and loading credits from the prior lodging house use, when applied to the requirements under the current Zoning Regulations, would result in no parking or loading requirement. In this case, because there has been no change in use, no additional parking spaces are required.

III.
Argument

A. The District Of Columbia Government Is Estopped From Suspending Or Revoking The Certificates Of Occupancy.

Based upon the facts of this case and upon the law of the District of Columbia, and even assuming that the allegations set forth by Appellant were true, the Appeal must be dismissed on the grounds of estoppel. The District of Columbia Court of Appeals has stated the elements which give rise to a claim of estoppel as follows:

1. A party, acting in good faith;

2. On the affirmative acts of a municipal corporation;

3. Makes expensive and permanent improvements in reliance thereon; and

4. The equities strongly favor the party seeking to invoke the doctrine.

Saah v. D.C. Board of Zoning Adjustment, 433 A.2d 1114 (D.C. 1981). This Board has previously recognized the applicability of estoppel to bar the revocation of a permit. See Appeal of Citizens Assn. of Georgetown, No. 13925; Appeal of Hugh L. Biens, No. 14093. The facts in this case lead to the conclusion that the District of Columbia is estopped from revoking the validly issued Certificates of Occupancy.

The four elements of estoppel, which the Court found relevant in Saah, are also found in the present case. The subject property was purchased by the owner in the summer of 1985. The purchase price for the Embassy Inn was $669,412. An inspection of the property by the Owner in 1985, prior to the purchase, revealed that the property remained in the same condition and configuration as when the lodging house was in operation in the 1960s. There was no evidence of a change to apartment house as has been alleged.

Specifically, the furniture, linens and towels were still in place, the lobby and front desk were still in their original configuration, and the building was otherwise configured as a lodging house. The prior owner indicated that he intended to resume the active operation of the lodging house, but that circumstances prevented him from doing so. He died in 1986.

Prior to the purchase, the Owner in good faith sought a ruling from the Zoning Administrator that the Embassy Inn, and a similarly situated establishment at 1842 16th Street, (known as the Windsor Inn, which was the subject of a hearing on October 12, 1988 in BZA Appeal No. 14865), could be operated as inns. Based upon this diligent inquiry, the Owner proceeded in good faith to purchase and renovate the property on the affirmative ruling of the Zoning Administrator that the property could be restored for inn use, and that the inn Certificate of Occupancy would be issued. The Owner would not have purchased the building if he knew that an inn use would not be permitted. The affirmative ruling from the Zoning Administrator, after a review of all relevant facts, was based on the prior use of the property as a "lodging house" pursuant to a previously issued Certificate of Occupancy.

After the purchase, approximately $1,030,443 was spent in renovation and rehabilitation of the Embassy. All necessary building permits were duly issued, and each issuance reaffirmed the legality of the inn use. As evidenced by the building permits, all work was completed at least two years, and in some instances three years, prior to the filing of the instant appeal. The improvements were in the nature of new central plumbing and bathrooms, HVAC and other permanent improvements. The owner clearly would not have incurred such expenses without the Zoning Administrator's assurance that the Inn would be able to open and operate as such.

The equities strongly favor the Owner in this matter. The property at 1627 16th Street has been used as a lodging house, inn or hotel at least since President Roosevelt was in the White House. The Appellant mischaracterizes this as a case of discontinuance from lodging house to apartment house. The Owner proceeded in good faith in contacting the appropriate city authorities and inquiring as to the status of the properties before purchase. Subsequently, the Owner relied on the affirmative assurances received from the Zoning Administrator and made substantial and permanent improvements. Some two years after all renovations were completed, with the inn opened for business for approximately one year, the Appellant filed the instant appeal challenging the certificate of occupancy.

The present owner did not know, nor did he have reason to question, the previous owner's tax status. If the owner were to be forced to convert the building to an apartment house or other matter of right use, substantial amounts of money would need to be spent for structural alterations, installation of bathrooms and kitchens, plus total reconstruction of the electrical and HVAC systems. Clearly, estoppel should apply in this case to protect the rights of the property owner as against the claims of the Appellant.

The legal commentators have spoken on this issue, and have stated positions which support the property owner herein. McQuillen, discussing the power of a municipal corporation to revoke a previously issued license or permit, states that:

> [s]substantial work done, expenditures made or obligations incurred under a license or permit, or other substantial change of position, generally will protect a licensee or permittee against a revocation of a permit .... Otherwise stated, a license or permit which has been acted upon cannot be revoked so as to deprive the licensee of the benefit of his expenditures or labor, especially where he has not done anything in violation of law or of the terms and conditions of the permit.

9 McQuillen, The Law of Municipal Corporations § 26.82 at p. 185 (3d Ed. 1978).

Similarly, in Zoning Law and Practice, Yokley states that:

> The courts have generally held, in a long line of decisions, that where a permit has been granted by an officer or board authorized to issue it and the permittee has acted in reliance thereon and incurred substantial expense, the right to continue construction under the permit becomes a vested right which the municipality or county has no right to violate by revocation, recall or otherwise.

2 Yokley, Zoning Law and Practice § 14-5 at p. 258 (4th Ed. 1978).

And finally, Rathkopf, in discussing what he terms the "doctrine of honest error," states that:

> In cases in which a permit is erroneously issued, but both a landowner and an official have acted in good faith, and construction has commenced, courts have held that landowner had acquired a vested right in the permits through their good faith reliance on them.

4 Rathkopf, The Law of Zoning and Planning § 50.04[3] at pp. 50-53 (4th Ed. 1982).

For the above reasons, the doctrine of estoppel will act to bar the revocation of the certificate of occupancy.

B. The Appeal Is Barred By Laches.

The doctrine of laches is defined as:

> The omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches.

Wieck v. D.C. Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978). The Court has held that this question of timeliness is jurisdictional; if an appeal is not timely filed, the Board is without power to consider it. Goto v. D.C. Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980).

The discussions with the Zoning Administrator regarding the issuance of the Certificate of Occupancy occurred in the spring and summer of 1985. The Zoning Administrator ruled in the late summer of 1985 that the Embassy could be operated as an inn. Subsequently, building permits were issued to permit the extensive

renovations to the structure. Extensive and costly renovations were completed, and the Certificate of Occupancy for the Inn was issued on June 26, 1987. The Inn was officially opened for business in September, 1987.

The original determination of the Zoning Administrator occurred in mid-1985, and was the basis of the issuance of the building permits in late 1985 and early 1986, and the June 1987 issuance of the Certificate of Occupancy. All renovation work to the structure was completed by this time. Yet the Appeal was not filed until June, 1988. The Appellant has offered no explanation for this unreasonable delay. At a minimum, Appellant waited approximately one full year before filing a challenge to the Certificate of Occupancy, and approximately 3 years after the issuance of the first building permit.

The D.C. Court of Appeals has determined that the question of timeliness of an appeal to the BZA is based upon a standard of reasonableness. In this context, the time for filing an appeal commences when the appellant is chargeable with notice or knowledge of the decision. Woodley Park Community Association v. D.C. BZA, 490 A.2d 628 (D.C. 1985). Clearly, a year delay at a minimum is an unreasonable and unexplained delay in asserting a claim for revocation, and under circumstances is clearly prejudicial to the property owner. The Court has held that the Board has no jurisdiction to consider an appeal which is not timely filed. (See Goto, supra). Here, laches divests this Board of jurisdiction and bars the Appellant from challenging the Certificate of Occupancy. Therefore the Appeal should be dismissed.

C. The Board Of Zoning Adjustment Lacks Jurisdiction To Hear This Appeal.

Section 3315.4 of the Zoning Regulations, and Board of Zoning Adjustment Form 1, on which appeals to this Board must be filed, clearly states that "If appeal is filed by agent of the

appellant, Form 1 (Notice of Appeal) shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal." The Appeal was filed by Kathryn A. Eckles, purporting to act in her capacity as President of the Residential Action Coalition. There is no letter of authorization from RAC authorizing Ms. Eckles to file the instant appeals. Attached to the Form 1, in a letter to the BZA, is a postscript from the agent for the Appellant that states that RAC voted to file appeals with the Board concerning properties at 1842, 1846 and 1627 16th Street, N.W. However, the letter does not provide authorization from the Appellant to the agent to file the instant appeal. The 14 day time limitation for filing all written material pursuant to Section 201.3 of the Supplemental Rules of Practice and Procedure has passed.

It is elementary that an appeal cannot be prosecuted by one without authority to do so. Because the record lacks any such evidence, the Board is without jurisdiction, and the Appeal must be dismissed.

D. The Residential Action Coalition Lacks Standing To Prosecute This Appeal.

RAC lacks standing as an "aggrieved person" to file this appeal in this matter. In this regard, the opinion of Judge Kelly of the D.C. Court of Appeals, concurring in part and dissenting in part In Goto v. D.C. Board of Zoning Adjustment, 423 A.2d 917, 927 (D.C. 1980), is instructive. Exhibit E. Judge Kelly recognized that to satisfy the threshold requirement of aggrievement, the citizens association in that case had to be able to show a specific, personal and legal interest in the case.

This Board is authorized to hear appeals filed by "any person aggrieved, or organization authorized to represent such person, by any decision ... granting or withholding a Certificate

of Occupancy." As an organization, the Appellant, RAC must therefore show the following in order to be permitted a hearing:

1. A showing of aggrievement;

2. Authority to represent such person aggrieved; and

3. Allegation of error in the decision.

As to the first element, the Supreme Court of the United States has held that:

> a mere 'interest in a problem,' no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient itself to render an organization 'adversely affected' or 'aggrieved' within the meaning of the APA ....

Sierra Club v. Morton, 405 U.S. 727, 739 (1972). This has been interpreted in zoning cases to mean that the application for relief must show an actual injury due to the governmental action. Rohan, Zoning and Land Use Controls, § 51.02[1] (1979). Generally, a party must show a direct, immediate, pecuniary and substantial interest in the subject matter. Baker v. Zoning Hearing Board of West Goshen Township, 367 A.2d 819, 822 (1976).

A property owners' association cannot be aggrieved unless it demonstrates that those whom it represents have a significant interest in the matter. Rohan, supra at § 51.02[2]. The majority of the Court in Goto did not reach the issue of jurisdiction, but Judge Kelly, in analyzing case and statutory law and the D.C. Zoning Regulations, stated that there must be a showing of:

1. A direct and logical nexus between the interests of the members of the Organization and the administrative decision it is contesting; and

2. Its own authority to represent those specific and significant interests.

Goto, 433 A.2d at 931.

The statement of RAC attached to the Notice of Appeal alleges no more than the "interest in a problem" which the Supreme Court found insufficient for standing in Sierra Club v. Morton.

The statements of the ANCs and various citizen groups are likewise expressions of general interest in the issue of short-term accommodations, but do not satisfy the threshold requirement of aggrievement.

Moreover, RAC does not purport to represent the interests of any property owner who lives in the vicinity of the subject site, and does not purport to represent the interests of the various citizen groups, who in any event have made no showing of RAC's authority to represent them.

For the above stated reasons, the Residential Action Coalition lacks standing to prosecute this Appeal. As such, the Appeal should be dismissed.

V.
Conclusion

For the above stated reasons, the property owners herein respectfully request that the Appeal be dismissed with prejudice.

Respectfully submitted,

WILKES, ARTIS, HEDRICK & LANE,
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